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Obtaining a Water Right

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OBTAINING A WATER RIGHT

COOPERATIVE EXTENSION SERVICE
SOUTH DAKOTA STATE UNIVERSITY
U.S. DEPARTMENT OF AGRICULTURE

OBTAINING A WATER RIGHT

FS 696

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The need for personal legal advice: The establishment and maintenance of rights in water require the consideration of facts and legal issues that are unique to each case. This fact sheet is intended to provide general information to the public and must not be used as a substitute for individual legal counsel.

Water is the property of the people of South Dakota. The state holds the water in trust for the use and benefit of the public.

A **water right** allows a person to use water in a "beneficial" manner as prescribed by law.

(Beneficial use is more completely discussed in FS 695, "Basis of South Dakota water law." It is vaguely defined as any use of water that is reasonable and useful and beneficial to the appropriator and at the same time is consistent with the interest of the public and the best utilization of water supplies.)

Second of two fact sheets dealing with state water rights. The first, FS 695, "Basis of South Dakota water law," discusses the history of riparian and appropriated rights to water and the benchmark 1955 legislation which made South Dakota essentially an appropriation state.

To receive the right to appropriate surface or ground water (other than for domestic use) it is necessary to obtain a permit from the Water Rights Commission.

Water Rights Commission

The Water Rights Commission is appointed by the Governor and by statute must include representatives of dryland farmers, range livestock producers, municipalities, the mining and timber industries, soil conservation districts, drainage districts, irrigation districts, and fish, wildlife and recreation interests.

The Water Rights Commission has the authority to develop a set of rules and regulations to govern the operation of the water rights distribution and maintenance in the state.

These rules cover such things as the definition of wells and diversion facilities entitled to protection under state law, rules for application and granting of water rights, establishment of fees for permanent water permits, water inspection and filing of papers, rules for domestic use, rules for large capacity wells, and rules allowing for the inspection of works under construction.

The Water Rights Commission has the duty and power to pass upon applications for water use. It has the power to establish water use control areas when

necessary to equitably apportion an available water supply.

It also has the duty to investigate formation of proposed irrigation districts and make recommendations on those plans, as well as the plans for formation of water conservancy districts. It must pass upon all plans for the construction of flood control facilities, intrastate drainage projects, watershed districts, and similar developments.

The Commission may reject applications if it is of the opinion that unappropriated water is not available. It may also refuse to consider or approve an application if it deems approval is "contrary to the public interest." The Commission may withdraw a water supply from further appropriation pending investigations relating to identifying the most complete utilization of the waters involved. These powers apply to both surface and ground water.

Applications for appropriation of water in excess of 10,000 acre feet annually must be approved by the Legislature.

The priority of a particular application dates from the moment an application is filed with the Water Rights Commission.

Procedure for obtaining water rights

The procedure for obtaining water rights is governed by

particular rules of the Commission which may vary from time to time.

In their general form they require the filing of an application, followed with notice to parties affected and the publication in area newspapers. After the passage of specified time periods, a hearing is held. After the Commission has received relevant evidence, which may include reports of the Commission's water engineer or the State Geological Survey, the application is either approved or denied.

If the application is rejected an appeal may be made to the state court system. If the application is granted, construction may begin and must be diligently pursued. The Commission will follow through to insure that the water diversion as finally constructed is in conformity with the permit granted.

The Water Rights Commission may issue any permit to use water subject to such terms, conditions, and restrictions which it considers necessary to protect the public interest. In addition, these terms may be changed or amended at any time after the permit is issued.

Permits for irrigation water use shall not exceed two acre feet per acre unless the irrigation method or soil type are unique and require more.

The Commission may also require that water measuring devices be placed upon irrigation systems.

"Mining" of water

The Water Rights Commission is **not** allowed to issue permits, including permits for irrigation use, that would allow the quantity of water withdrawn in a single year to exceed the average estimated annual recharge of water to the particular ground water supply (a practice usually referred to as the "mining" of water).

There is one exception to this prohibition of "mining." In the words of the 1978 Legislature, the Water Rights Commission may "approve applications for withdrawal of ground water from any ground water formation older than or stratigraphically lower than the greenhorn formation in excess of the average estimated recharge for use by municipal systems, non-profit water supply companies, water user districts, sanitary districts and other common distribution systems".

The "greenhorn formation" is a very persistent bed that most well drillers recognize. Water found below the greenhorn cannot be used for irrigation in most cases because it is not compatible with South Dakota soils. It is, however, considered safe for municipal and domestic water supply.

Very often, the water found in the formations below the greenhorn are the artesian formations.

So, as a general rule, there is a prohibition against mining for irrigation users and others who withdraw water from above the greenhorn. Below the greenhorn, municipal and domestic users are authorized to mine water if approval is granted by the Water Rights Commission.

Priority of domestic uses

The Legislature has established that domestic water use is to take the highest priority, receiving **precedence over all appropriative rights**. This means that every user who gains a right by appropriation is still junior to domestic uses.

A domestic use includes family uses, irrigation of personal gardens and trees up to one-half acre, and stock watering. Municipal pumping is also considered a domestic use under certain conditions.

There are several limitations on the preference for domestic use. One is that a domestic well, in order to be protected from large capacity wells, must not be "mining" water from a protected aquifer. Also, the Water Rights Commission has authority to establish minimum standards for the construction of all wells. In order for a domestic well to qualify for protection and preference it must comply with these minimum construction standards.

A domestic water user need not apply for a water use permit. However, domestic water users **may** record their use as a means of documenting the location and output of a water supply.

Artesian pressure

The Legislature has given a strong preference to domestic wells. This means that, subject to rules of the Water Rights Commission, large capacity nondomestic wells may not pump in a manner or quantity that draws off a domestic well.

This preference does not extend, according to the Legislature, to artesian pressure. The 1955 Act as applied appears to declare that there is no protected property right in artesian pressure.

The Water Rights Commission has the authority to establish minimum standards for the construction of all wells. The standards for construction of domestic wells may be based on a well's ability to produce water independent of artesian pressure.

What this means is that for a domestic well with artesian pressure to be entitled to its preference it may be required to have its pump in the aquifer, as would be the case with any other domestic well. In addition, the formations found below the greenhorn formation

are usually artesian formations, and these may be mined.

It should be said here that the constitutional question of whether artesian pressure is a property right subjected to protection has not been finally settled by South Dakota courts.

Water use control areas

It may happen that in certain areas conflicts will arise among the holders of water rights, as a result of an inadequate water supply in a given area. When this happens, the Water Rights Commission may respond in two separate ways.

First, the Commission may develop a water use control area when it receives the petition signed by at least 50% of the water right holders claiming water rights in a particular area. If the Commission determines that a water use control area is necessary in order to apportion the available water supplies among the holders of water rights, it shall develop a set of rules for the operation of the water use control area. These rules shall then be administered by the water master especially assigned for the purpose. In a water use control area initiated by petition, all users may be required to install water measuring devices and to pay annual fees based upon water use for the operation of the water use control area.

By a second available procedure, the Commission may proceed without the petition procedure. "When and where a shortage of ground water exists, the Water Rights Commission shall require the output of all large capacity wells . . . without regard to priority of appropriation be reduced equally in the area of the shortage except that the output of wells directly contributing to a shortage of water supplies for domestic

purposes may be reduced to a greater extent."

This second procedure is mandatory and does not appear to give the Water Rights Commission discretion. Thus, the two separate legislative provisions for dealing with area shortages appear to be in conflict as they apply to ground water. The first procedure is the only one available for dealing with area shortages of surface water.

Termination of water rights

Water rights may be lost by abandonment and forfeiture. If a water permit is not constructed, or not constructed within a reasonable period of time, or the water is not put to beneficial use, or the terms of the permit (such as the type of construction authorized) are violated, water rights may be cancelled, after a complete hearing with right of appeal.

Transfer of water rights

When water is being used for irrigation purposes, the permit is limited to irrigation on the land originally licensed. Transfer (by sale or other means) for irrigation on other lands may occur only with the approval of the Commission upon a showing by the user that use on the original piece of land has become impracticable, beneficially or economically. When transfers of this type are approved, the water user does not lose his priority attached to the first water permit.

In addition, irrigation permits may be transferred to ordinary household purposes, schools, hospitals or fire protection.

Subject to this limitation, water rights may be freely assigned.

Withdrawal of unappropriated waters

When the Water Rights Commission feels that there is insufficient knowledge or understanding of certain water areas or formations, it may withdraw unappropriated waters in that area or that formation from further appropriation until investigation has given the information necessary to intelligently distribute water use permits for that area or formation.

Reservations for future use

As a general rule, individuals may not file appropriations for future needs. However, state institutions, municipalities, and conservancy subdistricts may appropriate for future needs in the same manner that water is appropriated for current use.

When the Water Rights Commission grants approval of an application for future use, that use has a priority date. However, before the water may be put to actual use the appropriator must again apply to the Commission for a permit to put the reserved waters to beneficial use.

Application of a tenant

A lessee or tenant may acquire and transfer water rights in South Dakota. If the tenant is in possession, rights may be acquired in the same manner as the landowner is entitled. Presumably also, a tenant who has acquired an appropriative right may transfer that right apart from the land leased, except where the appropriation is for irrigation purposes, in which case the right is assumed to be part of the land, and transferable only with the specific approval of the Water Rights Commission.

Damming streams

If a non-navigable stream passes over the property of an individual, that individual may construct and maintain a dam only if the course of the stream is not changed, vested rights to the use of water are not interfered with, and no land is flooded other than that belonging to the owner of the dam or where a flood easement has been secured.

Dry draws

Where water flows at periodic intervals from melting snow or rain, it may flow in a water course customarily referred to as a "dry draw." The 1955 law defines a dry draw as "any ravine or water course not having an average daily flow of at least 0.4 cubic feet per second . . . of water during the period May 1st to September 30th inclusive. This shall not,

however, apply to a body of water such as a natural or publicly owned lake."

An owner of agricultural land may, subject to specified conditions, construct a dam across a dry draw and apply the water to beneficial use.

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